

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement  
Fresno Federal Courthouse  
2500 Tulare Street, 5<sup>th</sup> Floor  
Courtroom 11, Department A  
Fresno, California

**PRE-HEARING DISPOSITIONS**

**DAY:** WEDNESDAY  
**DATE:** NOVEMBER 15, 2017  
**CALENDAR:** 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

**No Ruling:** All parties will need to appear at the hearing unless otherwise ordered.

**Tentative Ruling:** If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

**Final Ruling:** Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions. If the parties stipulate to continue the hearing on the matter or agree to resolve the matter in a way inconsistent with the final ruling, then the court will consider vacating the final ruling only if the moving party notifies chambers before 4:00 pm at least one business day before the hearing date: Department A-Kathy Torres (559)499-5860; Department B-Jennifer Dauer (559)499-5870. If a party has grounds to contest a final ruling because of the court's error under FRCP 60 (a) (FRBP 9024) ["a clerical mistake (by the court) or a mistake arising from (the court's) oversight or omission"] the party shall notify chambers (contact information above) and any other party affected by the final ruling by 4:00 pm one business day before the hearing.

**Orders:** Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

1. [17-11824](#)-A-7     HORISONS UNLIMITED     MOTION TO DISMISS ADVERSARY  
[17-1056](#)     DMS-1     PROCEEDING/NOTICE OF REMOVAL  
HORISONS UNLIMITED V. HAAR ET     10-15-17 [[30](#)]  
AL  
DAVID SPIEKER/Atty. for mv.  
ORDER DENYING ECF NO. 61

**Final Ruling**

The motion has been denied. Order, October 26, 2017, ECF # 61.

2. [15-13655](#)-A-7     LEE BROGGI     CONTINUED STATUS CONFERENCE RE:  
[16-1083](#)     AMENDED COMPLAINT  
MANFREDO V. THOMAS ET AL     12-4-16 [[15](#)]  
DAVID JENKINS/Atty. for pl.

**Final Ruling**

The status conference is continued to December 12, 2017, at 10:00 a.m.  
If judgment has not been entered, not later than 7 days prior to the  
continued hearing the plaintiff shall file a status report.

3. [15-13655](#)-A-7     LEE BROGGI     CONTINUED MOTION FOR ENTRY OF  
[16-1083](#)     DRJ-3     DEFAULT JUDGMENT  
MANFREDO V. THOMAS ET AL     9-17-17 [[84](#)]  
DAVID JENKINS/Atty. for mv.

**Final Ruling**

**Motion:** Entry of Default Judgment

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Civil minute order

**DEFAULT JUDGMENT**

The clerk has entered default against the defendant in this proceeding. The default was entered because the defendant failed to appear, answer or otherwise defend against the action brought by the plaintiff. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed R. Bankr. P. 7055. The plaintiff has moved for default judgment.

Under Federal Rule of Civil Procedure 8(b)(6), the allegations of the complaint are admitted except for allegations relating to the amount of damages. Fed. R. Civ. P. 8(b)(6), *incorporated by* Fed. R. Bankr. P. 7008(a). The court accepts the well-pleaded facts in the complaint as true. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed. R. Bankr. P. 7055.

## **WELL-PLEADED FACTS**

The complaint contains well-pleaded facts concerning the existence of a real estate contract between the trustee and Defendants Lillian Thomas, Todd Thomas, and April Brice (the "Buyers") for the sale of residential real property located at 2232 Del Norte, Los Osos, California ("subject property"), having a purchase price of \$559,000. The court also accepts the following factual allegations as true for purposes of this default-judgment motion. The complaint pleads sufficiently that the contract contained the liquidated damages clause described in the complaint. Further, the complaint pleads adequately that the real estate contract was not performed by closing through escrow because the Buyers notified the trustee that one of the buyers lost a job and could not get approval for the loan necessary to complete the contract. The Buyers deposited \$8,000 into escrow, and \$8,000 does not exceed the cap placed on liquidated damages in the contract, which is 3% of the purchase price (3% of the purchase price was \$17,070).

## **LOAN CONTINGENCY ISSUE**

Previously, the court requested a supplemental declaration addressing whether the trustee believes in good faith that the loan contingency was removed, and addressing whether trustee cancelled the agreement in the event the loan contingency was not removed pursuant to paragraph 14D(1) of the purchase agreement.

A supplemental declaration has been filed by a real estate broker, Wendy Langston, who had been employed by the real estate brokerage firm employed by the trustee to sell the subject real property. This declaration affirms that the loan contingency was removed by the Buyers in this case. Accordingly, the court will grant the motion and enter default judgment.

## **CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

IT IS ORDERED that the motion is granted.

IT IS FURTHER ORDERED that plaintiff shall submit a judgment consistent with the order herein and shall do so not later than 28 days after November 15, 2017.

IT IS FURTHER ORDERED that the trustee may recover costs, Fed. R. Bankr. P. 7054(b).

4. [16-14367](#)-A-7 REBECCA ZHU  
[17-1015](#)  
UL LLC V. ZHU

MOTION BY SAM X. J. WU TO  
WITHDRAW AS ATTORNEY  
10-10-17 [[22](#)]

## **Final Ruling**

**Motion:** Withdraw as Counsel

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Continued to December 6, 2017, at 10:30 a.m. in Bakersfield

**Order:** Civil minute order

The Law Offices of Sam X.J. Wu move to withdraw as counsel of record for defendant Rebecca Shiying Zhu. In support of the motion the movant has filed a declaration, purportedly from the defendant, supporting his withdrawal.

## **DISCUSSION**

### Service of Process

Motions for withdrawal of counsel are contested matters. "The term "contested matter" is not defined in the Code or the FRBP. A motion with an identifiable adverse party (e.g., motion to avoid a judicial lien) is a contested matter from the outset." March, Ahart and Shapiro, *California Practice Guide: Bankruptcy*, Motions, Overview § 19;2 (Rutter Group 2016). Motions for which a party in interest resist the movant's entitlement to relief are also contested matters. *Id.* Contested matters must be served on the parties affected. Fed. R. Bankr. P. 9013-9014. A motion to be relieved as counsel of record has an identifiable adverse party, i.e. the defendant debtor, and is a contested matter.

Here, the Certificate of Service does not reflect service on the Rebecca Shiying Zhu. See Proof of Service, October 10, 2017, ECFs # 22-25. Lack of service deprives the court of jurisdiction over the motion. *In re Scott*, 437 BR 376, 379 (9th Cir. BAP 2010). Argument might be interposed that Rebecca Shiying Zhu declaration in support of the motion is a waiver of service of process. Fed. R. Civ. P. 4(d), *incorporated by* Fed. R. Bankr. P. 7004(a), 9014(b). This court questions whether the declaration meets the standards of Rule 4(d). But even if it does, given other concerns with respect to prejudice (below), the court exercises its discretion to require additional service of process on the respondent.

### Rule of Professional Conduct 3-700

State Bar Rule of Professional Conduct regarding termination of employment govern motions to withdraw in this court. LBR 2017-1(e). Rule 3-700(A)(2) provides, "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules."

Areas of particular concern are defendant Rebecca Shiying Zhu's (1) knowledge of upcoming dates and deadlines, e.g. Scheduling Order § 1.0, May 13, 2017, ECF # 12; and (2) ability to complete discovery, if applicable, and prosecute appropriate motions, in the 49 days remaining between the hearing on this motion and the pretrial conference. On these issues there has been an inadequate showing. Declarations in support of the motion do not address the issue. Since the scheduling order was served on counsel, not the parties, it is doubtful that the defendant is aware of those dates and deadlines. And the existence of outstanding discovery that must be completed, if not barred by the Scheduling Order § 1.0, prior to the pretrial conference is also of concern. See Stipulation, October 25, 2017, ECF

# 28 (" . . . the Parties wish to seek a continuance of the fact discovery deadline . . . .to allow for the completion of already propounded written discovery, resolution of disputes related thereto, and taking depositions." ).

#### Local Bankruptcy Rules

Though not a basis for this ruling, the court notes significant non-compliance with applicable local rules, including (1) not designating the motion with a docket control number, LBR 9014-1(c); (2) aggregating documents, LBR 9014-1(d)(4); and (3) notice of motion that does not indicate whether opposition must be filed in writing 14 days in advance of the hearing and does not advise the adverse party to check the court's website for prehearing dispositions. LBR 9014-1(d)(3)(i)-(iii).

#### **CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

IT IS ORDERED that this matter is continued to December 6, 2017, at 10:30 a.m. in Bakersfield;

IT IS FURTHER ORDERED that not later than November 22, 2017, the movant shall (1) serve the original motion, and all supporting documents, on Rebecca Shiying Zhu and all opposing counsel, (2) serve a notice of continuance, specifying the date, time and place of the continued hearing and that opposition may be offered at the hearing, and (3) file and serve a Certificate of Service demonstrating compliance with this order.

IT IS FURTHER ORDERED that not later than November 22, 2017, the movant shall file a declaration describing efforts to avoid and/or mitigate reasonably foreseeable prejudice to the respondent. Not later than November 22, 2017, the movant shall file a Certificate of Service demonstrating compliance with this order. In the event that the information described in this paragraph is subject to the attorney-client privilege or otherwise subject to a right of privacy, the movant is instructed to seeking a sealing order. LBR 9018-1.

5. [16-14367](#)-A-7 REBECCA ZHU  
[17-1022](#)  
STURGEON SERVICES  
INTERNATIONAL, INC. V. ZHU  
ALEXEI BRENOT/Atty. for mv.

MOTION BY ALEXEI BRENOT TO  
WITHDRAW AS ATTORNEY  
10-12-17 [[19](#)]

#### **Final Ruling**

**Motion:** Withdraw as Counsel

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Continued to December 6, 2017, at 10:30 a.m. in Bakersfield

**Order:** Civil minute order

The Law Offices of Sam X.J. Wu move to withdraw as counsel of record for defendant Rebecca Shiying Zhu. In support of the motion the movant has filed a declaration, purportedly from the defendant, supporting his withdrawal.

## **DISCUSSION**

### Service of Process

Motions for withdrawal of counsel are contested matters. "The term "contested matter" is not defined in the Code or the FRBP. A motion with an identifiable adverse party (e.g., motion to avoid a judicial lien) is a contested matter from the outset." March, Ahart and Shapiro, *California Practice Guide: Bankruptcy*, Motions, Overview § 19;2 (Rutter Group 2016). Motions for which a party in interest resist the movant's entitlement to relief are also contested matters. *Id.* Contested matters must be served on the parties affected. Fed. R. Bankr. P. 9013-9014. A motion to be relieved as counsel of record has an identifiable adverse party, i.e. the defendant debtor, and is a contested matter.

Here, the Certificate of Service does not reflect service on the Rebecca Shiying Zhu. See Proof of Service, October 12, 2017, ECFs # 19-21. Lack of service deprives the court of jurisdiction over the motion. *In re Scott*, 437 BR 376, 379 (9th Cir. BAP 2010). Argument might be interposed that Rebecca Shiying Zhu declaration in support of the motion is a waiver of service of process. Fed. R. Civ. P. 4(d), *incorporated by* Fed. R. Bankr. P. 7004(a), 9014(b). This court questions whether the declaration meets the standards of Rule 4(d). But even if it does, given other concerns with respect to prejudice (below), the court exercises its discretion to require additional service of process on the respondent.

### Rule of Professional Conduct 3-700

State Bar Rule of Professional Conduct regarding termination of employment govern motions to withdraw in this court. LBR 2017-1(e). Rule 3-700(A)(2) provides, "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules."

Areas of particular concern are defendant Rebecca Shiying Zhu's (1) knowledge of upcoming dates and deadlines, e.g. Scheduling Order § 1.0, May 13, 2017, ECF # 15; and (2) ability to complete discovery, if applicable, and prosecute appropriate motions, in the 49 days remaining between the hearing on this motion and the pretrial conference. On these issues there has been an inadequate showing. Declarations in support of the motion do not address the issue. Since the scheduling order was served on counsel, not the parties, it is doubtful that the defendant is aware of those dates and deadlines. And the existence of outstanding discovery that must be completed, if not barred by the Scheduling Order § 1.0, prior to the pretrial conference is also of concern. See Stipulation, October 4, 2017, ECF # 17 ("... the Parties wish to seek a continuance of the fact discovery deadline ... to allow for the completion of already propounded written discovery, resolution of disputes related thereto, and taking depositions.").

Though not a basis for this ruling, the court notes significant non-compliance with applicable local rules, including (1) not designating the motion with a docket control number, LBR 9014-1(c); (2) aggregating documents, LBR 9014-1(d)(4); and (3) notice of motion that does not indicate whether opposition must be filed in writing 14 days in advance of the hearing and does not advise the adverse party to check the court's website for prehearing dispositions. LBR 9014-1(d)(3)(i)-(iii).

The court shall issue a civil minute order that conforms substantially to the following form:

IT IS FURTHER ORDERED that not later than November 22, 2017, the movant shall (1) serve the original motion, and all supporting documents, on Rebecca Shiyong Zhu and all opposing counsel, (2) serve a notice of continuance, specifying the date, time and place of the continued hearing and that opposition may be offered at the hearing, and (3) file and serve a Certificate of Service demonstrating compliance with this order.

IT IS FURTHER ORDERED that not later than November 22, 2017, the movant shall file a declaration describing efforts to avoid and/or mitigate reasonably foreseeable prejudice to the respondent. Not later than November 22, 2017, the movant shall file a Certificate of Service demonstrating compliance with this order. In the event that the information described in this paragraph is subject to the attorney-client privilege or otherwise subject to a right of privacy, the movant is instructed to seeking a sealing order. LBR 9018-1.

6. [17-12272](#)-A-7 LEONARD/SONYA HUTCHINSON CONTINUED STATUS CONFERENCE RE:  
[17-1076](#) COMPLAINT  
 HUTCHINSON ET AL V. THE UNITED 8-8-17 [[1](#)]  
 STATES OF AMERICA, DEPARTMENT  
 DAVID JENKINS/Atty. for pl.  
 RESPONSIVE PLEADING

The status conference is dropped and no appearance is necessary. After the court rules on the United States' motion to dismiss (item # 7 below), the court will issue an order re-scheduling the status conference.

James E. Salven served the cross-complaint on cross-defendant the United States of America, Department of the Treasury, Internal Revenue Service, under Rule 7004(4), (5). The parties stipulated to an extension of time through and including November 15, 2017.

IT IS ORDERED that the United States of America, Department of the Treasury, Internal Revenue Service shall file a an answer to James E. Salven's cross-complaint, September 7, 2017, ECF # 7 or Rule 12 motion not later than December 13, 2017.

7. [17-12272](#)-A-7 LEONARD/SONYA HUTCHINSON CONTINUED MOTION TO DISMISS  
[17-1076](#) US-1 ADVERSARY PROCEEDING/NOTICE OF  
HUTCHINSON ET AL V. THE UNITED REMOVAL  
STATES OF AMERICA, DEPARTMENT 9-27-17 [[9](#)]  
JONATHAN HAUCK/Atty. for mv.  
RESPONSIVE PLEADING

The matter argued initially on November 1, 2017, no further argument will be entertained and the matter is deemed submitted. The court will issue a decision.

9. [16-14487](#)-A-7 HOMER/GRACIELA GONZALES PRETRIAL CONFERENCE RE:  
[17-1036](#) FEC-1 COMPLAINT  
 DE LA ISLA V. GONZALES 3-24-17 [[1](#)]  
 THORNTON DAVIDSON/Atty. for pl.  
 RESPONSIVE PLEADING

**No Ruling**